United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1158

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

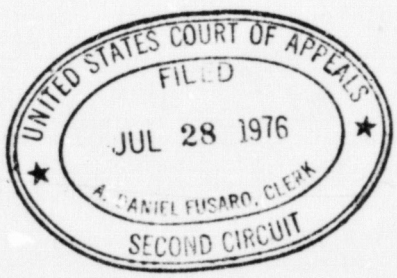
ARONA FARY DIOP,

Defendant-Appellant.

Docket No. 76-1158

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the District Court's failure to instruct the jurors on the issue of the voluntariness of appellant's statements is plain error, requiring reversal of the judgment.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable John F. Dooling, Jr.) rendered on March 26, 1976, after a jury trial, convicting appellant Arona Fary Diop of importing opium and marijuana in the form of hashish (21 U.S.C. §§952(a), 960(a)(1)) (Counts One and Three) and possession of those substances with the intent to distribute them (21 U.S.C. §841(a)(1)) (Counts Two and Four).

Appellant was sentenced to a term of three years' imprisonment and three years' special parole on each of the four counts, the sentences to run concurrently.

The Legal Aid Society, Federal Defender Services Unit, was appointed as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment[1]

On December 2, 1975, a superseding indictment was filed charging appellant with importing and possessing with intent

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[1]The indictment is B to the separate appendix to appellant's brief.

to distribute a quantity of opium and marijuana in the form of hashish.

B. The Pretrial Suppression Hearing

Prior to trial appellant moved to suppress statements allegedly made to Customs officials and agents of the Drug Enforcement Administration ("DEA"). At the hearing held to determine the issue, Charles Grabbatin, an employee of the U.S. Customs Service, testified that on November 7, 1975, at approximately 5:00 p.m., in the Pan-American Airlines cargo building at John F. Kennedy International Airport, he was approached by appellant (H.12[2]) and given documents, including an invoice, pertaining to a shipment of cargo contained in a wooden crate stored nearby (H.29). Grabbatin questioned appellant about those items listed on the invoice which were unfamiliar to the Customs agent (H.14-15, 30, 32). Grabbatin testified that appellant, who spoke with a heavy accent (H.17, 37, 39), stated that those objects were African musical instruments (H.15-16) and wood carvings (H.32). Specifically, Grabbatin testified that appellant pointed to the given instrument, "pronounced words," and indicated the particular item on the invoice (H.17). The Customs agent tes-

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[2] Numerals in parentheses preceded by "H" refer to pages of the transcript of the pretrial suppression hearing; when preceded by "T" such numerals refer to pages of the trial transcript. Numerals preceded by "GX" refer to numbers of Government exhibits introduced in evidence.

tified further that when appellant was asked whether the cargo were being picked up for appellant or someone else, appellant responded that it was for himself (H.13) and that this conversation between the agent and appellant was in English (H.17).

Grabbatin also stated that later on November 7, 1975, he arrested appellant after appellant had previously been arrested by a DEA agent (H.18-19, 36), that he then read appellant his Miranda rights from a card (H.19), and that during this procedure appellant seemed calm and unexcited (H.23). Grabbatin further testified that when he said to appellant that "[i]t was a good shipment and ... a pretty good way to bring it in," appellant responded "that he thought it was a good job" (H.27). According to Grabbatin, the "it" to which he was referring was the narcotics found in the crate.

DEA Agent Giaimo testified that on November 7, 1975, at approximately 5:30 p.m., in response to a telephone call, he and three other agents went to the Pan-Am cargo building (H.41) at JFK where they saw appellant "calm and composed," seated in the Customs area (H.42, 45). At that time, in English, the agents asked if appellant were there to claim "that shipment," to which appellant responded, "yes" (H.44-45).[3] Agent Giaimo then placed appellant under arrest and

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[3] During this conversation the crate which contained the shipment was not visible (H.46).

read to appellant his constitutional rights (H.48-49). During that time, appellant's demeanor did not change (H.51). Moreover, Agent Giaimo testified that, in response to questioning, appellant stated that the narcotics found in the crate were his; that he got them from Nepal and shipped them from Nepal to Africa and then to New York; that no one else was involved; and that he was going to "distribute" it (H.51). Further, Agent Giaimo stated that the interrogation was stopped after appellant indicated that he desired to speak to an attorney (H.52).

DEA Agent John Huber testified that on November 7, 1975, he also participated in appellant's interrogation at Kennedy Airport; that he asked appellant whether he had been advised of his constitutional rights and Miranda warnings; and that appellant stated that he had (H.67). Huber also testified that he asked appellant whether he understood what had happened and that appellant was under arrest, to which appellant's one syllable response was "yes" (H.63). Further, Agent Huber testified that in response to questioning, appellant stated that the contents of the wooden crate were his; that he himself had shipped the crate from Africa; and that he was going to "distribute" it in New York (H.64-65).

At the pretrial hearing, appellant, a citizen of Senegal (H.76), testified in his own behalf. In order to allow the District Court to observe the manner in which appellant then spoke English, appellant's initial testimony was in that

language (H.67). However, appellant's inability to comprehend the questioning in English and his difficulty in speaking the language necessitated the use of a French interpreter at the hearing.

Appellant testified that he speaks and understands some English (H.68, 70), but with difficulty (H.75, 81-82), and that in 1973 he studied the English language in the United States for three months at Columbia University, but did not attend classes regularly and failed the examination (H.68,69, 79, 83). Further, after appellant was shown a card containing the Miranda warnings, which had been admitted in evidence, appellant stated that although there were words on the card he could read and had a general idea of their meaning, he did not fully understand the warnings on the card (H.71-72). Moreover, appellant testified that he did not remember anyone reading questions from a card, and denied he had been told that he had a right to a lawyer (H.74).

Further, appellant explained that when Agent Grabbatin initially questioned him about the items on the invoice, the agent merely pointed to the printed name of the object listed on the invoice, which appellant could recognize, and that appellant would repeat the object's name and indicate its use by gesturing (H.77). Appellant also stated that his purpose in entering the United States on November 6, 1975, was to study English (H.81, 83).

Moreover, appellant testified that at the time of his

arrest, although he knew something was wrong, he did not comprehend what was then occurring, was "amazed," and could not understand the agents[4] (H.105-106). Finally, after the agents searched appellant, appellant said "Embassy, embassy" (H.106).[5]

Gorgui N. Diaye also testified in appellant's behalf at the hearing. Diaye stated that he accompanied trial counsel to the Metropolitan Correctional Center to interview appellant; that trial counsel unsuccessfully attempted to communicate in English with appellant; and that Diaye then served as an interpreter (H.110).

In rebuttal, Gerald Brady, general import manager of Continental Air Cargo, testified for the Government (H.114A).[6] Brady stated that on November 7, 1975, he was told by appellant that appellant required the services of a customs house broker and needed the contents of his shipment -- musical instruments -- for "a gig tomorrow night at 125th Street in Harlem" (H.114A-C). Brady also testified that appellant spoke with no accent "whatsoever" (H.114T).

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[4] Appellant testified that he had never before been arrested (H.106).

[5] The District Court credited appellant's testimony that he had asked for his embassy and rejected the agents' assertion that he had requested a lawyer (H.136).

[6] Brady explained that he processed paperwork necessary for the entry of shipments into the United States through Customs (H.114A).

Appellant, who was recalled to testify, denied that he had told Brady that the instruments were needed for a "gig" in Harlem, and explained that he did not know the meaning of the word "gig" (H.118).

After the hearing had been concluded, appellant's trial counsel argued that appellant's statements to the agents should be suppressed since, under the circumstances involved, no waiver of the various constitutional rights had been shown (H.121-122). Trial counsel further explained:

> ... This is not a question of the form required in Miranda.
>
> It's a question [of] whether the totality of the circumstances, some of which have been enunciated in Section 3501, Title 18 -- I have it for Your Honor ... all of it [referring to the subdivisions of 18 U.S.C. §3501] covers the procedural aspects ... covering a motion and the rest are totality of circumstances
>
> (H.126).

The District Court, finding the question "surprisingly close," suppressed appellant's post-arrest statements.[7] The Court held that in light of appellant's inadequate knowledge of English, the Government had failed to satisfy its burden of establishing that appellant consciously waived his right not to incriminate himself (H.129, 133).

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[7] The District Court's oral opinion is D to the separate appendix to appellant's brief.

C. The Trial

1. The Government's Case

At trial, Gerald Brady repeated the substance of his testimony given at the pretrial hearing (see, e.g., T.9-10, 12). In addition, he stated that on November 7, 1975, appellant gave him an invoice (GX1) which described the contents of the shipment in question and indicated that Danel Gallery was the shipper of the goods from Abidjan in Africa (T.13-14). Brady prepared the necessary Customs forms (T.19), communicating in English with appellant (T.20). Further, Brady testified that, according to the invoices presented, at the time the cargo had been shipped from Africa, it weighed 150 kilograms (T.27); that after it arrived in the United States, the shipment was re-weighed and found to weigh 270 kilograms (T.26-27; see also T.99); and that after shipment in Africa neither the shipper nor appellant could have handled the crate containing the cargo (T.30).

Agent Grabbatin also testified at trial. He stated that on November 7, 1975, appellant went to the Customs Inspection Room of the Pan-American Airlines Cargo Building at Kennedy Airport, to pick up a crate of merchandise.[8]

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[8]Agent Grabbatin identified the crate, and it was entered in evidence. Appellant's name -- misspelled -- was written on the side of the crate (T.56).

There, appellant gave the agent various documents pertaining to the shipment, including an invoice and carrier's certificate.[9] Agent Grabbatin testified that appellant did not state that the crate was appellant's; rather, he simply described the merchandise to the agent (T.56-57). Agent Grabbatin also stated that this short conversation was in English (T.60) and that appellant did not indicate any misunderstanding (T.61). After the crate was opened, Agent Grabbatin examined its contents (T.59), finding that it contained musical instruments and wood carvings (T.60). The crate was then emptied and its false bottom opened, revealing quantities of marijuana, opium, and hashish (T.65-67, 91).[10]

2. The Defense Case

Tony Archer, an owner of a gallery of primitive paintings and sculptures, testified that he had known appellant for approximately one year and had purchased African art

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[9]Grabbatin defined a carrier certificate as a negotiable instrument -- a bill of lading -- showing ownership of merchandise (T.43). The certificate reflected appellant's ownership of the merchandise (T.44).

[10]In addition, appellant's passport, reflecting travels to India on October 26, 1975, was entered in evidence (T.109, 112-113). Also, Matias Rodriguez, an employee of Pan American Airways, testified about the procedures for storing cargo at Kennedy Airport (T.115-117) and on airplanes generally (T.130-132). Further, Rodriguez stated that as a result of a Telex communication, he re-weighed the crate and found that it weighed not 150 kilos, but 270 kilos (T.123-124, 147-151).

from appellant four or five times during that period (T.180-181). Further, Mr. Archer stated that appellant spoke primarily in French and that their business transactions were conducted in a garbled mixture of French and English (T.181-182).

Mr. Stephen Glantz, a travel agent, also testified in behalf of appellant. Mr. Glantz stated that over a period of three years, and for his personal collection, he purchased various pieces of African art from appellant (T.188-189). Mr. Glantz also testified that during that period of time he occasionally made travel arrangements for appellant (T.190), but could communicate with appellant only in a mixture of French and English (T.188).

Appellant testified in his own behalf. He stated that he spoke and understood some English, but with difficulty (T.199, 216).[11] Further, appellant testified that although the art objects inside the wooden crate (GX8) were his, the crate itself, containing the narcotics, was not (T.203). Moreover, appellant denied putting the narcotics inside the crate (T.204, 215) and denied purchasing any drugs in Nepal or India (T.205), explaining that his travels were for the purpose of obtaining artifacts (T.204).

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[11] Appellant reiterated his testimony at the pretrial hearing that he attended Columbia University to study English but had failed the test (T.200, 227-229).

Appellant also testified that on November 7, 1975, he was asked by the Customs agent at the airport whether the merchandise on the invoice was for appellant. Through the use of gestures and some English, appellant described the objects on the invoice, although he did not understand everything the agent said (T.206-208). The agent left and returned and then took appellant to the area where the crate was stored (T.208-209). There, appellant told the agent that a mistake had been made, since the crate stored there was not appellant's (T.209, 218) and was not the crate given to Air Afric for export from Abidjan (T.218). The crate was opened, whereupon appellant discovered that the art objects inside were his (T.209). Appellant testified that the next thing he knew, he was arrested, handcuffed, searched, and questioned (T.210-211). Appellant testified that he did not understand the questioning or what was happening at that time (T.211).

Moreover, appellant denied telling any of the agents that the drugs in the crate were his and that he had imported them (T.215, 231-232). He also denied making a statement to Mr. Brady about a "gig" in Harlem (T.217).

3. The Government's Rebuttal

Agents Giaimo, Grabbatin, and Huber testified about the custodial, post-arrest statements allegedly made by appellant on November 7, 1975.

Agent Giaimo testified that he arrested appellant and advised him of his constitutional rights by reading from a card and that appellant said he understood (T.235). Further, the agent testifed that, in response to questioning, appellant stated that the shipment was his; that he knew it was marijuana and hashish; that he shipped it from Nepal to Africa and then to the United States; that he was going to "distribute" it in New York by himself; and that no one else was involved (T.238). During the interrogation, appellant "looked the way he looks now" (T.239).

Agent Grabbatin testified that after he discovered the false bottom on the crate, he asked appellant if he was picking up the shipment for himself, and that appellant responded by stating his name, "Arona Diop" (T.246). Moreover, the agent stated that appellant never said that the crate was not his and, although acknowledging that appellant had an accent (T.158), asserted that his conversation with appellant was in English (T.246-247). Agent Grabbatin also testified that he, too, read Miranda warnings to appellant (T.249) and that afterwards, and in response to questioning, appellant stated that "it was a good job" (T.253).

Agent Huber testified that, in English, appellant acknowledged that the contents of the crate were his and that he intended to "distribute" it (T.270-271). During this time, appellant was calm (T.271).

4. The Motion for Acquittal

After the Government's rebuttal evidence, appellant moved for a directed verdict of acquittal on the ground that the Government had failed to prove its case beyond a reasonable doubt. While denying the motion, the District Court found:

> The question seems to me is a close one, of course, but ... the jury could without being unreasonable find from the evidence before it a guilty verdict beyond a reasonable doubt....
>
> (T.277-278).

D. The Charge[12]

In light of its prior ruling suppressing appellant's post-arrest statements and in accordance with Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass, 420 U.S. 714 (1975), the District Court told the jury that appellant's statements could be used only in assessing appellant's credibility. Specifically, Judge Dooling instructed the jurors:

> The Government has presented testimony concerning statements allegedly made by defendant at Kennedy Airport on November 7th and it has argued that what he there said contradicts or is inconsistent with his testimony here in court. You must determine whether you are satisfied that the defendant did make such statements, whether they are inconsistent with or contradictory

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[12]The complete charge is C to the separate appendix to appellant's brief.

of his testimony here.

> you do find inconsistency or contradiction, you may consider that only in determining the defendant's credibility as a witness. Apart from the question of his credibility as a witness, you may not treat what you find Mr. Diop said at Kennedy Airport as evidence of what the facts are. You may treat it only as nullifying those parts of defendant's testimony here which are inconsistent or contradicted by what you find he said at Kennedy Airport.
>
> (T.339-340).

In order to insure that the jurors understood that this instruction applied only to those statements made after the drugs had been discovered, the District Judge reiterated that portion of his charge:

> "The Government has presented testimony concerning statements allegedly made by Defendant at Kennedy Airport on November 7th after the crate and its bottom compartment had been opened, and it has argued that what he there said contradicts or is inconsistent with his testimony here in court. You must determine whether you are satisfied that the Defendant did make such statements and whether they are inconsistent with or contradictory of his testimony here. If you do find inconsist[e]ncy or contradiction, you may consider that only in determining the Defendant's credibility as a witness. Apart from the question of his credibility as a witness, you may not treat what you find Mr. Diop said at Kennedy Airport after the crate and its bottom compartment had been opened as evidence of what the facts are. You may treat it only as nullifying those parts of the Defendant's testimony here which are inconsistent with or contradicted by what you find he said at Kennedy Airport."
>
> (T.346-347).

The District Court failed to instruct the jurors on the

issue of the voluntariness of any statements made by appellant.

After deliberations, appellant was found guilty as charged.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO INSTRUCT THE JURORS ON THE ISSUE OF THE VOLUNTARINESS OF APPELLANT'S STATEMENTS IS PLAIN ERROR AND REQUIRES REVERSAL.

At the pretrial suppression hearing, appellant, a citizen of Senegal, testified that he had difficulty speaking and understanding English; that he did not fully understand the warnings and constitutional rights enumerated on a Miranda card shown to him; that he did not remember anyone reading from such a card; and denied that he had been told he had a right to a lawyer. Moreover, at the time of his arrest, appellant realized that something was wrong, but did not comprehend what was happening or understand the agents, and was "amazed."[13] At the hearing, appellant's lack of understand-

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[13] Appellant's amazement and lack of understanding are consistent with, and would explain, the agents' testimony that during questioning appellant was "calm," "unexcited" (H.23; T.271), and that appellant's demeanor did not change (T.239).

ing of English was corroborated by the testimony of Gorgui N. Diaye, who served as trial counsel's interpreter during pretrial interviews of appellant.

Trial counsel, citing to 18 U.S.C. §3501, which requires that the District Court determine the issue of voluntariness and instruct the jury on that question, argued that appellant's post-arrest statements should be suppressed, indicating that the appropriate standard was governed by that statute and the totality of the circumstances (H.126). See Schneckloth v. Bustamonte, 412 U.S. 218, 225-226 (1973); Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Blackburn v. Alabama, 361 U.S. 199, 207 (1960); WIGMORE ON EVIDENCE, §826 at 352-354 (rev.ed. 1970). Without explicitly ruling on this argument, the District Court suppressed appellant's statements, finding that the Government had not established appellant's waiver of his constitutional rights.

At trial, appellant denied purchasing any drugs or putting narcotics in the crate, and reiterated that the crate was not his. Moreover, appellant testified that after he was arrested, handcuffed, and searched, he was questioned by the agents but did not understand the questioning or what was happening at that time. Appellant's lack of understanding of the English language was corroborated at trial by two witnesses who had purchased African art objects from appellant over a substantial period of time.

The Government's rebuttal case consisted primarily of

appellant's custodial statements which had previously been suppressed. Thus, the following statements were admitted in evidence: that appellant said he understood his constitutional rights; that the shipment was appellant's; that he knew it was marijuana and hashish; that he shipped it from Nepal to Africa and then to the United States; that he intended to "distribute" it and was going to "distribute" it in New York by himself; that the contents of the crate belonged to appellant; and that it was a "good job." Additionally, there was testimony about appellant's demeanor after arrest and an assertion by an agent that appellant never said that the crate was not his.

Despite the fact that the District Court had suppressed appellant's statements, that trial counsel had argued the applicability of 18 U.S.C. §3501, that there was voluminous trial testimony about appellant's inability to understand English and the circumstances of his arrest (i.e., about voluntariness), the District Court failed to charge the jury on the issue of the statements' voluntariness in accordance with the mandate of 18 U.S.C. §3501(a). This constitutes plain error. United States v. Barry, 518 F.2d 342, 347 (2d Cir. 1975).

The requirements of this Court's decision in Barry are clear:

> ... §3501 does unequivocally require a specific charge on the issue of voluntariness.
>
> Id., 518 F.2d at 346.

Moreover, the fact that appellant denied making some of the statements attributed to him did not relieve the District Court from its obligation to instruct the jurors on voluntariness or to relate a general instruction to the specific facts of this case:

> This imperative [an instruction to the jury on voluntariness] is not qualified ... by a defendant's denial that he has ever made any inculpatory statement.... A defendant may properly claim that he made no incriminating statements and that any statements which the jury might find that he made were coerced.
>
> Id., 518 F.2d at 346-347.

Thus, the District Court here fell into that error against which this Court so clearly warned in United States v. Barry, supra, 518 F.2d at 348. While properly limiting the jury's consideration of appellant's custodial statements to the question of appellant's credibility, the District Court twice stated that the jurors' sole consideration as to those statements was whether they had, in fact, been made and whether they contradicted appellant's trial testimony. By this charge, the trial judge erroneously eliminated from the jurors' consideration the crucial issues of the voluntariness of the statements, their accuracy, and the fairness of the procedures used to obtain them in light of the circumstances shown at trial.[14] United States v. Barry, supra.

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[14] We would be acting contrary both to the language of the statute and to the intent

Moreover, even if the jury found that appellant had made the statements, it was improper for the District Judge to allow the jurors to use the statements to rebut appellant's claim of innocence at trial unless they first found those statements to be voluntary and accurate under all the circumstances. Malinski v. New York, 324 U.S. 401, 404 (1945); Payne v. Arkansas, 356 U.S. 560, 581 n.1 (1958); Haynes v. Washington, 373 U.S. 504, 513 (1963).

Even though the statements made in this case were admitted only for the limited purpose of impeaching appellant's credibility, a clear instruction on voluntariness was still necessary.[15] In the words of the District Judge, this case was a "close one" (T.278). Although the District Judge told the jurors that appellant's statments could be used only in considering appellant's credibility, appellant's credibility

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(Footnote continued from page 19)

> of Congress were we to exclude the issue of fairness in securing the confession, independently of its reliability, from the ambit of jury consideration.
>
> United States v. Barry, supra, 518 F.2d at 348.

[15] On its face, 18 U.S.C. §3501 applies to the circumstances involved here, since the terms of the statute require jury instructions about "any confession of guilt" or "any self-incriminating statement made or given orally...." 18 U.S.C. §3501(e) (emphasis added).

was the central element of his defense, since appellant flatly denied guilty knowledge.[16] Thus, the statements had critical significance. Their proper evaluation by the jurors, a matter vital to the defense, could only be made in light of the required instruction on voluntariness. The absence of this instruction was highly prejudicial, requiring reversal of the judgment. United States v. Barry, supra, 518 F.2d at 348-349.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted,

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[16] Indeed, the only direct proof of appellant's knowledge of the contents of the crate was in appellant's post-arrest statements.

CERTIFICATE OF SERVICE

July 28, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Barbara Silberman